MOTION FILED MAY 16 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 542

DUNCAN COFFEE COMPANY,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF SUPPORTING THE PETITION FOR REHEARING, AND BRIEF.

WRIGHT PATMAN, *amicus curiae,*
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INDEX

	Page
Opinions below	3
Jurisdiction	3
Question presented	3
Statute involved	4
Statement of nature and result of the case	4
Argument	6

Cases

Booth Fisheries Corp. v. *Bowles*, 153 F. 2d 449	10
Electromatic Distributors v. *Clark*, 162 F. 2d 212	11
Fox Packing Co. v. *Fleming*, 161 F. 2d 209 (211)	10

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Now comes Wright Patman and respectfully requests leave of the Court to file the attached brief as amicus curiae in support of the petition for rehearing. Counsel for the petitioner have consented to the filing of this brief, but counsel for the respondent have declined to consent to such filing.

Respectfully submitted,

WRIGHT PATMAN, *amicus curiae,*
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AMICUS CURIAE, BRIEF SUPPORTING THE PETITION FOR REHEARING, WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

Opinion

The opinion of the lower court is reported at 178 F. 2d 926.

Jurisdiction

Jurisdiction arises from Section 204 (d) of the Emergency Price Control Act of 1942 as amended. 50 U. S. C. A. App. 924 (d).

Question Presented

Whether the respondent's interpretation of the coffee import subsidy agreement so as to deprive petitioner of 3¢ per pound of the value of its coffee lawfully acquired

equally and alike with all roasters as such, is lawful, constitutional and plainly required by the language of said import subsidy agreement.

Statute Involved

Emergency Price Control Act of 1942 as amended (U. S. C. A. App. 901 et seq., 56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664).

Statement of Nature and Results of the Case

This case concerns a transaction between the respondent government agency and petitioner a coffee roaster and also a coffee importer, arising under the authority of the Emergency Price Control Act of 1942 as amended (R. 167). This legislation was enacted during and for the purpose of overcoming, the greatly disturbed unprecedented economic conditions in the nation. It provided for the payment of certain subsidies for the purpose of encouraging the production of various commodities, one of them being coffee, and quite naturally the agreement and provisions for the coffee import subsidy was made with the importers who were established in the performance of the coffee importing functions, as it was an underlying purpose of this legislation to restore and stabilize the normal economy.

The Department of Agriculture had issued quotas to such importers, and thusly the subsidy agreement identified the functions of importing and the identity of the importer who because of such functions was thereby qualified as an importer to receive such subsidies. Under the subsidy arrangement the importers received 3¢ per pound on coffee which they imported. They paid out this 3¢ per pound to the coffee growers in the foreign countries, for no coffee is grown in the United States.

The coffee industry in the United States traditionally includes enterprises or business concerns who confine their functions to that of importing exclusively, and others who perform only the functions of a coffee roaster (processor) exclusively, and still others who perform under integrated management the functions of the importer as such, and also the functions of the roaster as such. But the subsidy arrangement, agreement and program was in all essentials in the same language, terms, tenor and conditions, with all importers equally and alike as such, without mention or regard to whether the particular importer did or did not perform any functions of the roaster or processor.

This subsidy arrangement or agreement therefore, is not complained of in anywise as it respects or provides for repayment to respondent arising from petitioners having exercised the importer functions thereunder, for the classification, provisions, application and effect thereof, were in every sense plain, clear, equal and alike upon all importer functions, without regard to any processor (roaster) functions that may or may not have been also exercised.

The controversy involves the question of whether the subsidy arrangement or agreement intended and clearly and lawfully provided that the continued exercise of the processor (roaster) functions of the industry were thereby to become subject to peril of payment to the government when the processor functions were performed during the time covered by the agreement by those who were also qualified importers as such, including petitioner. The agreement was amended March 19, 1946 and May 7, 1946 after having been originally made on November 19, 1945. It is from these amendments, more especially the latter, that the controversy arises. No element of payment by the importer to the government was in anywise mentioned or provided for by the terms of the original agreement.

The only basis claimed for such withholding is respondent's contention that the language of the import subsidy agreement plainly imperils the continuation of such roaster practices of acquiring coffee from importers who had imported it, to the extent of 3¢ per pound on all such coffee on hand at the end of the import subsidy period.

Processors (roasters) whose functions were traditionally confined to acquiring coffee from importers who had imported it into the United States were not concerned with the subsidy agreement, since they could not qualify thereunder as they had no import quota assigned by the Department of Agriculture. Not having historically performed the functions of importing they did not have import quotas. There were more than 1,000 roasters as such in the United States. There were 312 importers as such, who participated in the import subsidy program. Therefore, there were at least 688 roasters who exercised no import function, and the business of all roasters alike is highly competitive. Petitioner's roaster coffee and substantial quantities of coffee in the hands of all roasters at all pertinent times, were economically identical and subject to identical government controls upon all roasters alike (Petitioner's Br. 40, 41, 43).

Argument

This transaction cannot be fairly interpreted as if it were concerned with a commercial trade contract. This Court will take notice that it is not determining such a transaction but one arising in the atmosphere of disturbed, unprecedented, unusual conditions in which both the supporting legislation and the transaction itself were conceived. It is natural to expect this Court to view this transaction in the total unprecedented environment out of which it arose and in which it was performed. It seems of course, that the lower court stopped somewhat short of this full duty, and

instead, adopted a theory so highly refined as to lead to the reasonable conclusion that from some undisclosed source this import subsidy was actually intended to add a further and entirely new doctrine of peril to the already disturbed economy of the very essential competitive coffee roaster functions as such.

Nothing could be farther from the true situation. This record discloses without contradition (and it was public knowledge), that without the coffee roaster functions as such, protected not only by our national economic traditions and philosophy but by our jurisprudence as well, in the fair, equal and identical known industry practices of buying the coffee as did this petitioner, from the importer who had imported it, there would be no normal distribution (Petitioner's Br. 37(5), 39(13), 40(21), 42(29-31).) Any interference to retard or imperil the fair, equal and competitive continuation of this roaster function to any extent correspondingly adds further disturbance and confusion to the very conditions which this program sought to remedy.

If it had been intended to single out a particular class of roasters as such and to visit peril upon their continued competitive roaster functions for the duration of this agreement, there would necessarily have to be some reasonable basis for such classificattion in order to justify the departure from the standard of equal treatment for all competitively situated. Moreover, such a classification would necessarily have to be plainly expressed because the Statute under which authority for classification arises is a uniform Statute making no exceptions in its application. Certainly the mere fact that some roaster functions were smaller and others were larger would not be sufficient to meet the test of reasonableness.

This legislation and this agreement were enacted to encourage the normal established and competitive economic functions and conditions. It is obvious that wherever

peril was intended to be visited upon any traditional function, it was the duty of the government draftsman to distinctly so declare such peril. It is common knowledge and notable that the government draftsman did speak with unmistakable clarity to all sizes and segments of the meat slaughtering and packing industry equally and alike in the pointing out of peril which would attach under their subsidy by virtue of the well-known "ownership and control" clause contained in the subsidy regulations on meat. That subsidy like the coffee import subsidy, was a production subsidy. It existed under the identical law, environment and for the identical purposes as did the coffee import subsidy. It was conceived out of and designed to remedy the identical conditions of unprecedented disturbance. In its purpose, intent and desired economic results it was identical with the coffee import subsidy program.

Is it not still the law that our governmental agency interpretation must be distinctly clear in its elements of forfeiture and in the taking of one citizen's money, competitive equality or his liberty under identical authority in one case as in the case of another? Is less clarity of peril and deprivation required of the government draftsman in its production subsidy transactions with respect to meat for public economic benefit and stability of established methods of distribution, than is required in transactions of identical nature and purposes under the identical authority with respect to the production subsidy of coffee?

In the situation of confusion and disturbance existing at the time, the preciseness of ultra distinction as to mechanical or ministerial method employed by the governmental agency to accomplish the government's purposes in this subsidy program is beside the point. Such microscopic distinctions between the legal effect and the presence of peril flowing from language when used in a regulation or order, and identical language when used in such agreement or contract,

ought not to distort the integrity of the government in its studied but wholly initiatory purpose to so aid and encourage the functions of the coffee importer as such. If it was intended that the functions and inventory of the coffee roaster as such, were to become subject to the competitive peril, discrimination and loss that has actually resulted in this roaster's case, then it was surely the sovereign's duty to point out such intent in the same unmistakable language as it had done in the identical atmosphere by clearly so specifying in respect of the relations between the slaughterer and a purveyor of meats.

A brief comparison of the coffee subsidy and of the meat subsidy will illustrate the government's duty in this environment to point with clarity to the intended peril. Both subsidy programs are of a production nature and arise from identical authority and are of identical substantive purpose and effect (Section 2(e) Emergency Price Control Act of 1942 as amended, 50 U.S.C. App. 902 (e)).

The government paid the subsidy to nonprocessing meat slaughterers knowing they were compelled to pass it along to the farmer in the purchase price paid him for his cattle, just as the subsidy was paid to the coffee importer as such, knowing he would have to pass it along to the grower in the foreign country.

The government notified the slaughterers that if they were affiliated with a processor (accomplished by clear definitions) the slaughterer's subsidy would thereby become imperiled. With exceeding clarity the government drew the distinction between the functions which were imperiled and those to which no peril was intended.

In the coffee import subsidy the alleged clarity by which this peril was *visited upon the functions of the roaster as such* and which peril was was intended (alleged) *to flow from the performance of the importer functions*, was not

mentioned or otherwise pointed out with any similarity to the careful draftsmanship above mentioned. In fact, the lower court was rather abrupt in its treatment of the continued unchanged employment of and reference to the phrase "the importer" as it consistently appeared in this coffee import subsidy from the beginning to the end. It is not expected that this Honorable Court would be inclined to look upon the continued, repeated and consistent usage of identical language from beginning to the end of this transaction, as being sufficient to establish equal clarity with the language used to point out peril in respect of subsidy to the meat slaughterers. (Fox Packing Company vs. Fleming, 161 F. 2d 209 (211).)

The lower court appears to feel that the importing functions exercised by the Duncan Coffee Company is dominant in its economic existence. It states that ". . . some such importers . . . of which the Duncan Coffee Company was one purchased part of their green coffee supplies from other importers". The implication of the choice of words made by that lower court would seem to indicate that it considered the acquisition of coffees by the petitioner from other importers to constitute a function of the importer as such. Not only is such a result not true, but it is contrary to all the evidence. When the petitioner acquired coffee from domestic suppliers who had imported it, it was performing the function of roaster as such, in all respects economically identical with such roaster functions as were engaged in traditionally by all roasters equally and alike, in precisely the identical circumstances and atmosphere of disturbed economic conditions as the Booth Fisheries Corporation engaged in the function from which the identical court relieved it of peril (153 F. 2d 449), and in the identical sense, economic purpose and effect as the court relieved of peril in the case of the Electromatic Distributors vs. Clark

(162 F. 2d 212). However, the lower court appears to be unduly impressed with the fineness of distinction between identical language when used in the regulation arising under this law and identical environment and when used in the particular agreement at bar arising under the identical law and in the identical environment.

The lower court's impression might well arise from its apparent inclination to confine its determination wholly to the language of the amendments themselves. It emphasizes the first amendment and minimizes the second and final amendment and it apparently in its reasoning actually substituted "Duncan Coffee Company" for "the importer", and ". . . engaged in the importation of coffee" (R. 41), not only in the controversial paragraph 14 as amended but in the entire agreement as well.

It overlooks respondent's admitted prior knowledge of the dual functional characteristics prevailing in the industry and of the economic competitive equality between each of those *functional* characteristics. It passes lightly over the importer *functional classification* dignified by *license in recognition thereof*, which had to be issued by the government and *which could not be conferred upon the roaster functions*, for the simple reason that such functions did not include the functions of the importer as intended by and expressly referred to in the third unnumbered paragraph of the agreement as it appears on page 41 of the printed record. It passes lightly over the innumerable and frequent usage of the identical language including subparagraph 8a (R. 44). It is noted that, in this connection and in this identical environment the government through its recognized agency issued War Food Order 146 (11 F.R. 3785), the effect of which specifically recognized the distinction between the importer *function* as such and the roaster *function* as such, in respect of the quantities of inventory which each were

permitted to have on hand at any time, without regard to whether each or either of such *functional* statuses might or might not be integrated with any other *function*. Therefore, it cannot be denied that no advantage or benefit could accrue to this petitioner's *roaster functions* or activities by virtue of petitioner's importer functions or activities, which advantage did not likewise, equally and alike accrue to every other roaster in the land, whether affiliated or integrated or not.

The lower court hastily passed over the detailed treatment and requirements of the agreement in respect of each step of the *functional* performance of the importer's characteristic *activities as such* thereunder, notwithstanding that *nowhere in the agreement is any functional activity of the roaster as such either described, mentioned or alluded to.*

The lower court appears to be impressed with what it considers as an advantage accruing to the petitioner by reason of the increase in the quantities which it was authorized *to import*. It overlooks the obvious fact that such increase could be of no individual advantage to the petitioner in the amount or quantity of inventory it was permitted to hold at any time, without running afoul of War Food Order 146. It overlooks entirely the fact that similar increases were applicable to all importers as such equally and alike, since the program was not peculiar to the petitioner alone. In truth, the lower court appears to be overly impressed with the idea of a single contractual premise and strictest concepts thereof as in the case of a single contract in the nature of a private commercial undertaking and in such an environment. It rewrote *not only* the agreement, but its entire setting as well, and not in the interest of the objective result intended by the law authorizing all production subsidies, not in the interest of fair treatment of the roaster function,—but wholly in the interest of harsh, unwholesome

advantage to the government and it did so by providing an entirely new setting totally different from that which existed in fact.

It appears that the lower court considered that this agreement conferred a private commercial advantage or some other competitive private benefit upon the importer which reacted to his advantage in respect of his competitive roaster functions. This theme prevails throughout the lower court's opinion. Such a conclusion or impression is contrary to common knowledge of economic reality and truth, and is grossly inaccurate in view of the existing controls which applied to the quantity of coffee and the price thereof in this roaster's operations equally, identical and alike with at least 688 other competitive roasters who had acquired free of prejudice, substantial inventories of identical coffee, for identical purpose, from identical sources and in the exercise of identical roaster functions and traditions. The truth about the matter is simply that by exercising the importer function the petitioner like all other importers equally and alike, merely "produced" more coffee into the United States which the government under its inventory control and its pricing control, orders and regulations, made equally as available to one roaster as another regardless of integration of the roaster function and the importer function. The lower court in this case has obviously lost "the common touch".

The second amendment to this agreement appeared on May 7, 1946 and is the particular amendment out of which arise the questions involved. The pertinent part thereof reads as follows:

> "in the event of an increase in or removal of OPA maximum prices on coffee, *the importer* shall pay to RFC an amount equal to the equivalent of the increase in value of his inventory, computed as follows:

"(a). The rate shall be 3¢ per pound green basis, or the increase in OPA maximum prices, whichever is larger.

"(b). The inventory shall include all types of coffee, measured in green basis equivalents, at the close of business on the day prior to such increase in or removal of maximum prices, which either *the importer* owns in the continental United States or for which a bill of lading covering shipment to the United States for *the importer's account* has been issued in a foreign port; provided that the total inventory shall be reduced by the quantity of such coffee which the importer has contracted to sell at a fixed price not to exceed the OPA maximum prices for coffee in effect April 1, 1946.

"(c). The total amount of repayment to RFC under this paragraph shall not exceed the amount of payments by RFC *to the importer* under this agreement as amended." (Emphasis ours).

After having used the phrase "the importer" throughout this production subsidy agreement in its functional sense and purpose as the law made necessary to its validity (producing-importation into the United States from foreign countries), the plainest sense of the amendment simply stated is, the same importer functional identity as such (R. 41), as is engaged in the importation of coffee into the United States in the exercise of the governmental quota permitting the exercise of that function, shall pay 3¢ per pound on coffee in the hands of such functional identity whether the coffee was in the United States, or a foreign port. Certainly it would have been proper also to set out that a roaster function acquiring coffee from importers after it has been imported, shall also pay 3¢ per pound when the roaster function is integrated with or controlled by the management of an importer function, if that had been intended.

It must be remembered that this paragraph and this amendment are not isolated or complete transactions within

themselves and they do not appear in an environment of orderliness or stability. They relate to the original agreement as well as the underlying legislation and its objective, purposes and the conditions then existing which prompted such enactment. This agreement, including the amendment, is in fact the hand of government laid upon the established importing functional resources and activities of an established industry, for government's unusual purposes. Added peril or control of the roaster function was not needed because the roaster quantities and prices were already controlled and regulated in all things equally and alike. Therefore, if it was intended plainly to add still another peril or control to some roaster functions only when exercised by a particular one or more roasters and not upon all roasters as such equally and alike—and to the point of giving some a 3¢ per pound advantage over others, it is government's duty to do so with far greater clarity than innuendo or inference.

Does the phrase "the importer" as used in only one place ("the importer owns in the continental United States * * *") have a sufficiently different meaning to fix an entirely new peril on a traditional activity that involves *no importing functions?* Does it plainly have a meaning grossly different to that of the identical phrase further along in the same sentence ("* * * covering shipment to the United States for the importer's account * * *"), or a meaning when used at this one single point so grossly different from that clearly intended by the numerous uses of the identical phrase throughout the agreement?

Of course, respondent's acrobatic efforts to impart plain notice of peril to the roaster functions, by the language of subparagraph c, is refreshing but very like pointing to the haystack which could contain the needle. Moreover, it is equally logical if not more so, for such language to mean

that the importer shall not be required to pay in excess, if he shall have been penalized by some violation, as is pointed out in petitioner's brief at page 35. Your *amicus curiae* respectfully submits that government draftsmanship imposing peril, discrimination and forfeiture of the nature here concerned should be held to the duty of such express clarity that its interpretation can safely be determined by hornbook and that such is assuredly not the case here if respondent's interpretation is to prevail.

In this situation, the unassailable truth is, this roaster function has suffered discrimination and a loss and a taking by the government contrary to the Fifth Amendment of the Constitution, of 3¢ per pound which was obviously and notoriously not suffered by at least 688 others economically, identically and competitively situated—and this was done with no compensation or possible lawful chance of recovery—if this Honorable Court proposes to disregard all evidence and common knowledge and to hold that the coffee roasting business is not highly competitive. Your *amicus curiae* is confident that the fact of such loss to this roaster's competitive functions and property value and the sizable burden of discrimination visited upon this roaster, cannot be factually successfully denied.

The admitted and the uncontradicted evidence (petitioner's brief 37 to 58 inc.) clearly shows that this roaster as such was beyond a doubt, economically and competitively identical with all roasters, and that situation in the face of the commonly known facts that none of such competitive roasters on their substantial quantities of coffee obtained from identical sources of supply under identical conditions and for identical purposes, suffered any such loss or taking or discrimination, makes the respondent's interpretation repugnant to the realistic appreciation of equality and fair competition in our economy.

It is compelling that this entire undertaking of the coffee import subsidy program and this agreement was of an importing nature and none other. There is no more clearly stated purpose in this agreement to follow the coffee from the importer who imported it to this roaster or to any other competitive roaster for the purpose of so-called recapture after this roaster had lawfully purchased it from the importer, than it was clearly provided that the same coffee should be followed for recapture into the hands of the grocer or even the consumer. The very purpose of this recapture forces the importer to sell—and who will he sell to but the roaster—all roasters as such, equally and alike.

Aside from the disturbed conditions at the time and the law's purpose to restore and stabilize normal distribution and economy—competition, under the plain sense of paragraph 8b of the agreement (R. 44), it was expected that importers as such would sell to roasters as such equally and alike and that roasters as such, all roasters, would buy equally and alike from importers, as had been established traditionally in this industry. The lower court overlooked these economic invariables, which are neither cloistered nor secluded.

Where is the language in this agreement clearly notifying this roaster as such, that it will become necessary for him to reduce or cease making purchases in the traditional roaster industry practice from the importer—except at his competitive peril, while at least 688 competitors could continue to enjoy the protection of War Food Order 146 from which he would thereby be effectively excluded, even though he was economically dependent upon his sales, like his competitors, of roasted coffee? Does the Court propose to disregard the known facts and the evidence in its entirety—and proceed solely upon a distorted theory alone?

In reality this coffee import subsidy agreement, instead

of being contractual in the usual and strictest sense is actually more in the nature of a joint initiatory venture by the government by its use of the industry importing functional establishment, but essentially in the public interest as distinguished from the immediate competitive advantage profit of the individual importer. No importer as such, and no roaster could have any inventory quantity advantage as long as War Food Order 146 was needed—and it remained throughout this venture.

Conclusion

In the environment of the unprecedented conditions giving rise to this importer production subsidy agreement (or distinguished from a roaster functional control measure), and to all such subsidies of similar nature, and to the extraordinary legislation and philosophy authorizing them, whether regulation, agreement, contract or order, it may well be considered a step significantly contrasting to the harmonious and constructive relations between government and the productive competitive economy upon which our private enterprise system depends, if this Honorable Court permits this assuredly truculent and abortive interpretation of the respondent to stand.

Your *amicus curiae* feels it necessary and proper to respectfully make clear the fact that he neither has nor will accept any pecuniary interest or any other profit, gain or benefit of any nature or extent whatsoever, directly or indirectly related to or arising from this case or the private enterprise concerned. His labor and careful study of this case is and has been solely in the public interest and the personal belief that it is his honorable duty to express as *amicus curiae* his sincerest and considered convictions before this Honorable Court according to the privilege granted him.

Prayer

WHEREFORE, your *amicus curiae* respectfully prays that the petition for rehearing and the writ of certiorari as prayed be granted.

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